United States
Circuit Court of Appeals
For The Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. D. BRANHAM,
Defendant in Error.

Upon Writ of Error to the District Court of the United States, for the Eastern District of Washington, Northern Division.

Opening Brief for Plaintiff in Error

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STATEMENT OF THE CASE.

The Oregon-Washington Railroad & Navigation Company, the plaintiff in error, as a part of its railroad system owns and operates a branch line through the City of Pullman, in Whitman County, Washington. In passing through the said City of Pullman, its right of way and tracks cross Kamiakam Street at right angles. Kamiakam Street is one of the principal streets of the city leading from the main part of the

city to one of the residence districts. The Northern Pacific Railway Company's right of way joins the right of way of the Oregon-Washington Railroad & Navigation Company, and the two lines parallel each other in crossing said Kamiakam Street. The Palouse River parallels the Oregon-Washington Railroad & Navigation Company's right of way at the point in question, and Kamiakam Street is carried over the same on a bridge, the end of which comes in close proximity to the right of way of the company.

Some time during the year 1915, the City of Pullman concluded that this Kamiakam Street bridge over the Palouse River was in need of repair, and entered into negotiations with the two railroad companies to provide for the repair of the bridge. These negotiations resulted in a contract between said City of Pullman and the plaintiff in error. (See Plaintiff in Error's Exhibit 5.) Pursuant to the terms of the agreement referred to, the plaintiff in error commenced the repair of said bridge and was prosecuting the same during the winter of 1916. Some time prior to the 4th day of February, 1916, work had ceased upon said bridge on account of the inclemency of the weather and no work had been done on said bridge on the day above referred to; on the 4th day of February, 1916, the defendant in error while attempting to cross said bridge about six o'clock in the evening, slipped and fell and sustained a Pott's fracture of the left leg. That within thirty days thereafter the defendant in error filed a claim against the City of Pullman, setting forth the nature and extent of

her injuries and cause of same. (See Exhibit 2.) Some time thereafter this suit was brought and the City of Pullman was joined as a defendant with the plaintiff in error. Prior to the trial, however, the City of Pullman was dismissed out of the suit on motion of counsel for the defendant in error, and the case went to trial against the plaintiff in error alone.

The verdict of the jury was against the plaintiff in error.

A motion for judgment notwithstanding the verdict was duly considered by the court pursuant to stipulation entered into between counsel for the respective parties, prior to the submission of the case to the jury, and after considering said motion, same was denied. (Record, pg. 16).

The jury returned a verdict against the plaintiff in error in the sum of $3750.00, and judgment was entered thereon.

Motion for new trial was duly interposed and after hearing the same, the motion was denied. (Record, pg. 16).

Judgment was entered in accordance with the verdict in favor of the defendant in error and against the plaintiff in error.

It is to review the proceedings had in said cause and the judgment entered therein, that this writ is prosecuted.

We will discuss the evidence more in detail in connection with the argument upon the various assignments of error.

ASSIGNMENTS OF ERROR.

The following errors specified as relied upon and each of which is asserted in this brief and intended to be argued, are the same as those set out in the Assignments of Errors appearing in the printed record, to-wit:

I.

That the United States District Court in and for the Eastern District of Washington, Northern Division, erred in denying the motion of the defendant for a non-suit immediately at the conclusion of the introduction of evidence by the plaintiff, for the following reasons:

1. That no cause of action has been proven against the defendant.

2. That defendant has not been shown to have been guilty of any negligence or breach of any duty towards the plaintiff.

3. That the accident which happened to the plaintiff was caused by the acts and negligence of the plaintiff herself, or by the negligence of some other person or party for which this defendant was not responsible, and not by reason of any negligence on the part of the defendant or any of its employees.

4. That under the contract with the City of Pullman, by which defendant had been performing certain work in connection with the re-construction of the bridge referred to in the complaint of the plaintiff, there was no duty, expressed or implied, on the part of the defendant in connection with the use of

said bridge by the plaintiff, or the public of which the plaintiff was one, and that the defendant was not liable in case of any failure to perform any duty in connection with the maintenance of said bridge, if there was such failure of duty.

5. That the defendant was entitled to judgment of dismissal upon its motion.

II.

That the court erred in denying defendant's motion for a directed verdict in favor of the defendant immediately at the close of all of the evidence, for the following reasons:

1. That no cause of action has been proven against the defendant.

2. That the defendant had not been shown to have been guilty of any breach of duty towards the plaintiff.

3. That the accident which happened to the plaintiff was caused by the acts and negligence of plaintiff herself and not by reason of any negligence on the part of the defendant.

4. That under the contract with the City of Pullman by which the defendant had been performing certain work in connection with the re-construction of the bridge referred to in the complaint of the plaintiff there was no duty, expressed or implied, on the part of the defendant in connection with the use of said bridge by which the plaintiff, or the public of which the plaintiff was one, and that defendant was

not liable in case of any failure to perform any duty in connection with the maintenance of said bridge, if there was such failure of duty.

5. That the defendant was entitled to a verdict on the evidence, by the direction of the Court.

III.

That the Court erred in denying defendant's motion for judgment notwithstanding the verdict (counsel for the respective parties having stipulated that such motion might be made and passed upon by the court), upon the following grounds:

1. That the evidence did not show any negligence on the part of the defendant; that if the negligence of any party contributed in any way to the injury of plaintiff, it was not the defendant company, but was the City of Pullman or the contributory negligence of the plaintiff herself.

2. That the evidence showed that the plaintiff was guilty of contributory negligence which was the cause of the injury complained of.

IV.

That the court erred in denying the defendant's motion for new trial on the following grounds:

1. Excessive damages appearing to have been given under the influence of passion and prejudice.

2. Insufficiency of the evidence to justify the verdict of the jury and that it was against the law.

3. Error in law occuring at the trial and execpted to by the defendant.

V.

That the court erred in giving and refusing the instructions to the jury, in the following particulars:

1. The court erred in refusing to give instruction No. 1, requested by the defendant, as follows:

"Instruction No. 1. I instruct you to return a verdict in this case in favor of the defendant," which refusal was excepted to before the jury retired, as follows: "We except to the refusal of the court to give instruction No. 1 requested by the defendant."

2. The court erred in refusing to give instruction No. 3, requested by the defendant, as follows:

"Instruction No. 3. From the mere fact that an accident happened and plaintiff was injured you are not to infer negligence on the part of the defendant, but the presumption is that the defendant was exercising due care at all times and the burden is upon the plaintiff to overcome this presumption by a preponderance of all of the evidence in the case." To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 3 requested by the defendant."

3. The court erred in refusing to give instruction No. 4, requested by the defendant, as follows:

"Instruction No. 4. I instruct you that the reconstruction and repair of the bridge along Kamiakam Street in the Town of Pullman by the defendant, Oregon-Washington Railroad & Navigation Company, was undertaken by said defendant under and pursuant to a contract in writing entered into between the Town

of Pullman and the defendant, Oregon-Washington Railroad & Navigation Company, by the terms of which the said Town of Pullman expressly agreed to keep the said street and bridge closed during the said period of repair and reconstruction. Therefore, if you find from the evidence that the town of Pullman failed to close the said bridge in accordance with the terms of the contract above referred to and permitted the same to be used by the public during the said period of repair and reconstruction and if you further find from the evidence that by reason of the failure of said town of Pullman to so close the said bridge that plaintiff entered upon the same and while on the same or a part thereof slipped and fell and was injured, then you are instructed that this defendant is not liable therefor and your verdict should be for the defendant."

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 4 requested by the defendant."

4. The court erred in refusing to give instruction No. 6, requested by the defendant, as follows:

"Instruction No. 6. I instruct you that if you find from a preponderance of the evidence that the defendant was negligent in any of the particulars alleged in the complaint, other than negligence in respect to snow and ice upon the walk, and you also find that the snow and ice had been allowed to accumulate on the sidewalks on said bridge over and along Kamiakam Street, and you further find that the accident to the plaintiff from which she sustained her injuries com-

plained of was due as much to the slippery and unsafe condition of the sidewalk as to the condition created by the negligence of the company, if you find any such negligence, then I instruct you that the defendant company is not liable to the plaintiff, and your verdict shall be for the defendant.

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 6, requested by the defendant."

5. The court erred in refusing to give instruction No. 7, requested by the defendant, as follows:

"Instruction No. 7. The court instructs you that the plaintiff, Mrs. Branham, was required under the law to use ordinary care in passing over the sidewalks of the Town of Pullman, and the walk on the bridge in question, and if you find from the evidence that the sidewalk of the town of Pullman in question was defective and in a dangerous condition due to the negligence of the defendant at the time and place of the accident, you will next proceed to determine whether plaintiff at said time and place was exercising ordinary care.

By ordinary care is meant the care which an ordinarily prudent person would use in travelling over the sidewalks of the city, and if you find from the evidence that Mrs. Branham at the time and place of the accident was not using ordinary care in travelling over the said sidewalks of the city, as I have defined the meaning of the words, ordinary care, then you must find for the defendant, notwithstanding that you might believe from the evidence that the defend-

ant at the time and place of the accident was negligent in some particular complained of by the plaintiff; provided further you find from the evidence that the want of care of Mrs. Branham in travelling over the sidewalk at the time and place of the accident contributed proximately to her accident and the injury resulting therefrom."

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 7, requested by the defendant."

6. The court erred in refusing to give instruction No. 8, requested by the defendant, as follows:

"Instruction No. 8. I instruct you that if either the knowledge of the condition of the sidewalk or the place upon which Mrs. Branham slipped and fell, or the fact that she was wearing at the time improper shoes with which to go upon a walk the condition of which she knew, was the primary cause of the accident, she was guilty of contributory negligence and cannot recover and the verdict should be for the defendant."

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 8, requested by the defendant."

7. The court erred in refusing to give instruction No. 9, requested by the defendant, as follows:

"Instruction No. 9. I instruct you that when a person knows of a dangerous sidewalk, or a sidewalk in a dangerous condition, the law requires her to exercise such reasonable care as the ordinarily prudent and cautious person would use under like circum-

stances. If this is done and injury results, the person is without fault and if you find this to be the case, then Mrs. Branham was not guilty of contributory negligence. If this were not done and the failure so to do proximately contributed to the injury sustained by Mrs. Branham, then she would be guilty of contributory negligence and could not recover.

The question of whether upon all facts in the case as disclosed by the evidence, Mrs. Branham was or was not guilty of contributory negligence, is one for your determination.

If from the evidence you find that she was guilty of contributory negligence and such negligence on her part was the proximate cause of the injury sustained by her, then you shall find for the defendant."

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 9, requested by the defendant."

8. The court erred in refusing to give instruction No. 11, requested by the defendant, as follows:

"Instruction No. 11. I instruct you that the undisputed evidence in this case is to the effect that barriers were placed at the north end of the bridge and sidewalk extending clear across the same.

I further instruct you that the undisputed evidence is that in order to go upon the sidewalk on which plaintiff fell, she was required to pass around the end of the barrier so placed.

I further instruct you that if you find that in so doing she did not exercise ordinary care, as heretofore defined in these instructions, then you will find

her guilty of contributory negligence and your verdict shall be for the defendant. The fact that other persons had travelled the street and taken the risk incident to going upon the walk in the condition in which it was, does not change the rule herein laid down. There are always persons who take risks if a short cut can be made and who will go upon a street even if it is obviously not open to public travel."

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 11, requested by the defendant."

9. The court erred in instructing the jury as follows:

"If you find from the preponderance of the testimony in this case that the sidewalk where this injury occurred was constructed by the Oregon-Washington Railroad & Navigation Company, for the use of foot passengers in the city of Pullman while the work was under construction; or, if you find that the city knew that the sidewalk would be used by the general public, then the duty rested upon the Railway company to make the sidewalk reasonably safe for that purpose. Whether it was reasonably safe, is for you to determine; and, in determining that fact, you must take into consideration the temporary character of the walk, the purpose for which it was constructed, and all the surrounding circumstances.

If you find that the railway company constructed it for the use of the public, or with knowledge of the fact that they would use it, and if you find that it

was not reasonably safe for that purpose, the plaintiff is entitled to recover here unless she herself was guilty of contributory negligence."

To which defendant excepted as follows: "We except to the instruction given by the court in regard to the construction of the sidewalk by the defendant Oregon-Washington Railroad & Navigation Company, for the reason that there is no evidence showing that the Oregon-Washington Railroad & Navigation Company constructed the sidewalk or the portion adjacent thereto referred to in the evidence."

10. The court erred in instructing the jury as follows:

"If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through the impairment of her earning capacity in the past, although I believe that there is no testimony before you as to what her earning capacity was. These items will make up the amount of your verdict, in the event that you will find for the plaintiff."

To which the defendant excepted as follows: "The defendant excepts to the instruction of the court in regard to the earning capacity of the plaintiff, for the reason that there is no evidence of any kind offered to show what the earning capacity of the plaintiff was and there is nothing for them to claim any damages upon this question of the case."

VI.

The court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant.

ARGUMENT.

I.

No cause of action was proven against plaintiff in error. (Assignments I, II, III and VI.)

By referring to the contract under which plaintiff in error was repairing the bridge across Kamiakam Street (Ex. 5), the court will note that the City of Pullman as one of the considerations imposed upon it agreed to keep the said bridge closed to traffic during the period of construction. At the time of the accident on February 4th, 1916, and for about two weeks prior thereto, "possibly a little longer" (Record, Pg. 20) the plaintiff in error had not been doing any work thereon. It appears from the testimony of Mr. Reed, a brother-in-law of defendant in error, that this suspension of work was due to "quite a bad spell of weather at the time, snowing and thawing." (Record, Pg. 20). The plaintiff in error, which hereafter we will refer to as the Railroad Company, was under no obligation to protect the public against the dangers incident to the use of said bridge unless the Railroad Company knew that the public was using it and that the City was failing to perform its obligation under the contract referred to. There isn't a

suggestion of any evidence that the Railroad Company had such notice, nor is there any evidence that during the entire period that said work was suspended that the Railroad Company knew anything of the dangerous condition of the said bridge, or that the public was using or attempting to use any part of the temporary structure placed there by the Railroad Company. In fact there was no evidence offered by the plaintiff to show that the planking upon which Mrs. Branham fell, was placed there by the Railroad Company.

It seems to us clearly that under this showing, or rather lack of showing, plaintiff in error should not have been held.

It appears from the evidence that the City of Pullman placed barriers at the end of the bridge and that these barriers were sufficient to give warning to travellers that the same was in an unsafe and dangerous condition.

Mr. Reed, brother-in-law of defendant in error and the first witness called in her behalf, explained how in order to go upon the walk upon which Mrs. Branham fell, it was necessary for one to skirt around the barriers that had been placed there as a warning against the dangerous condition of the walk. (Record, Pg. 30.)

The next witness, Mr. Pinkley, called on behalf of defendant in error, testified as follows:

> "* * * There was a barrier across the right of way at the north end of the bridge, and the top rail of that barrier—I believe there was one

rail, if I remember right, extended from the sidewalk.

Q. And how did pedestrains get up on the sidewalk on the bridge past that barrier?

A. Well, I know how I did. I swung around the barrier on the end." (Record, Pg. 35.)

At this point, when requested to illustrate to the jury, the examination was interrupted by Mr. Plummer of counsel for defendant in error, with the following remark:

"There is no dispute about that, Mr. Hamblen, they all walked around the barrier."

Mrs. Branham testified in substance as follows:

"Assuming that this is a barrier across the north end of the bridge and this is where the people and I went around, and these are the planking here, I presume I had taken three or four steps onto this planking when I fell. * * *

The path seemed lumpy and slick, but after I had passed the boards (barrier) and swung around the boards I thought I was past the dangerous place, but I could not see that before I got to it." (Record, Pg. 40.)

Again Mrs. Branham testified:

"I did observe that the condition was there lumpy, slippery and snowy as I was approaching the bridge. I remember having to catch hold of those planks as I went past them.

(The only planks which Mrs. Branham could have caught hold of was those constituting the barrier at the north end of the bridge.)

"* * * It was slick. It was slippery and icy on the walk and on the boards, and I could feel the condition as I walked. I could not see because it was dark." (Record, Pg. 44.)

Mr. Hooper, Street Commissioner of the City of Pullman, testified as follows:

> "If Mrs. Branham fell within two or three feet of where the barrier was, she would have to step over the barrier there, either do that or move it." (Record, Pg._____.)

Unless the rule requires the construction of a high board fence with barbed wire entanglements, in order to give the public notice of the existence of a dangerous condition, it would seem that the defendant in error, and any other person who might have attempted to cross the bridge in question, were fully warned of the dangerous condition that existed there. In view of this, we feel that the injury sustained by Mrs. Branham was the result of her own negligence, and her willingness to assume any risk which might result by attempting to go upon a dangerous place of which she had full and sufficient warning.

The Supreme Court of the State of Washington has discussed the law where the warning given by barriers has been disregarded in the case of *Hunter vs. Montesano,* 60 Wash. 489. At page 490 the Court says:

> "It appears not only that Main Street outside of the sidewalk area was properly barricaded, but that respondent saw the barriers, and knew the condition of the street. He said that it was not safe for travel with teams. If it was not safe for teams in the day time, it is obvious that it was dangerous for a footman in the night time. * * * *
>
> Barriers are danger signals. They serve no other purpose. Where a traveller is injured upon

> a street which he knows is closed to travel or being improved, he cannot raise the question of a sufficient barrier. There can, it seems to us, be but one conclusion upon respondent's evidence; that is, that he was guilty of the grossest negligence.
>
> The duty of a city to keep its streets in good repair necessarily carries with it the right to close the street and to suspend travel while repairs and improvements are being made."

This case very fully reviews the decisions upon this question, and we invite the Court's attention particularly to this case. Believing the Court will accept this invitation, we will not refer to the numerous cases discussed in said opinion which in our mind are clearly in point on the issue here raised. We submit that defendant in error should not have been permitted to recover in view of the facts as developed by the testimony referred to.

II.

The motion for new trial should have been granted or the verdict should have been reduced.

The defendant in error in her complaint, paragraph six, alleges special damage in that her occupation was that of a dressmaker, and that as dressmaker she was capable of earning on an average of about $3.00 per day, and that by reason of the injury complained of she was utterly unable to follow such occupation. No evidence of any kind was offered on behalf of Mrs. Branham to show what she was capable of earning, or that in fact she was capable of earning anything.

The court recognized this failure of proof in the instruction given by the court, and which was duly excepted to by the plaintiff in error, as follows:

> "If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through the impairment of her earning capacity in the past, although I believe that there is no testimony before you as to what her earning capacity was. These items will make up the amount of your verdict in the event that you find for the plaintiff." (Record, Pg. 103.)

The rule seems to be well established upon this question. The general rule seems to be found in Vol. VIII, Ruling Case Law, at page 663. We quote from Sect. 205:

> "Furthermore it is error to instruct that the jury may award damages for loss of probable earnings or for decreased earning capacity where the evidence does not sustain these elements of damage with reasonable certainty and hence does not furnish any proper basis for allowance."

Duke vs. Railway Company, 12 S. W. 636.

The court there said:

> "When such damages are susceptible of proof as to approximate accuracy and may be measured with some degree of certainty, they should not be left to guess of the jury, even in actions *ex delicto.*"

Stoetzle vs. Swerringen, 70 S. W. 911.

There it is held:

> "There is no distinction between loss of earnings and loss of time caused by a personal injury in respect to the necessity of making proof as to the value of the time lost, if plaintiff recovers for

> that item. It is error to submit an instruction to a jury directing them to award damages for plaintiff's loss of time if they find the issues in his favor, if no testimony as to the value of plaintiff's time was introduced."

See also *W. U. T. Co. vs. Morris,* 83 Fed. 992.

The Court states at page 994:

> "It is a well established rule in cases of this character that where damages are claimed for loss of time incident to an injury or for expenses incurred for medicine and medical treatment or for permanent impairment of health, or loss of capacity to labor, there must be some evidence before the jury tending to show damages of such a character; otherwise an instruction which authorizes a jury to assess such damages is misleading and erroneous, and sufficient cause for a reversal of the judgment, unless it clearly appears that such instruction has in fact done no harm." (Many cases cited.)

See also recent case decided by the Supreme Court of Washington, *Armstrong vs. Spokane & Int. Ry. Co.,* 101 Wn. 525.

We believe a reading of the testimony of Dr. Pattee, whose deposition was taken in the case and who was the physician attending Mrs. Branham at the time of the injury, is conclusive upon the proposition that there was nothing of an unusual nature in the injury received by Mrs. Branham and that the recovery was normal and complete. This was clearly shown by the testimony of the doctors who made an examination at the time of the trial of the case.

Without some special damages being proven, surely a verdict of $3750.00 could not be justified.

III.

Under this sub-division we wish to discuss briefly some errors which we think were committed by the court in regard to the instructions given and refused: (Assignment V.)

Necessarily some of the matters in connection with errors complained of under this assignment, have been discussed in other parts of the brief and we will endeavor not to burden the court with repetitions. By not discussing in detail some of the instructions and refusal to give other instructions, we do not wish to be considered as waiving the errors in connection therewith, but urge upon the court that it consider the same as fully set forth in the assignments of error and as disclosed by the record herein.

In requesting instruction No. 6, which was as follows:

> "I instruct you that if you find from a preponderance of the evidence that the defendant was negligent in any of the particulars alleged in the complaint, other than negligence in respect to snow and ice upon the walk, and you also find that the snow and ice had been allowed to accumulate on the sidewalks on said bridge over and along Kamiakam Street, and you further find that the accident to the plaintiff from which she sustained her injuries complained of was due as much to the slippery and unsafe condition of the sidewalk as to the condition created by the negligence of the company, if you find any such negligence, then I instruct you that the defendant company is not liable to the plaintiff, and your verdict shall be for the defendant."

We felt we were entitled to this instruction under the issues as made by the pleadings and particularly in view of the negligence alleged in paragraph four of the complaint and which may be summed up in the language of the concluding part of said paragraph, as follows: "that the condition of said temporary and defective sidewalk aforesaid, was such that said defendant railroad company and said defendant City of Pullman had permitted to accumulate upon said planking laid as such temporary and defective sidewalk on said street, quantities of snow and ice, the same having been permitted to accumulate in a rough, uneven, slippery, dangerous and negligent condition upon said planking constituting said sidewalk as aforesaid." This taken in connection with the statement contained in the claim filed by Mrs. Branham against the City of Pullman shortly after the accident happened, and which is Exhibit 2 in the case, and which sets out the cause of the accident in the following language, to-wit: "this injury was caused because of the defective, dangerous and unsafe condition that the street and sidewalk was in at this point on account of planks having been placed along said street at this point on which snow and ice had wrongfully and negligently been permitted to accumulate by the city, and become ridged up on said planks and as a result thereof had become very slippery and when I attempted to walk thereon, not then knowing the true and dangerous condition thereof, I unavoidably fell and sustained the injury above stated"; these allegations taken in connection with the proof offered, par-

ticularly that of Mrs. Branham, who testified that she knew of the slippery and uneven condition of the walk when she was going upon the same (Record, Pg.____), it seems to us that the instruction referred to was a proper instruction. The immediate cause of the injury must have been the slippery condition of the walk, and we believe that the rule laid down in the case of *Stone vs. Boston & Albany R. Co.,* 41 L. R. A. 794, and cases cited there, would control this case. In this case it was held:

> "The rule is very often stated that, in law the proximate and not the remote cause, is to be regarded; and, in applying this rule, it is sometimes said that the law will not look back from the injurious consequence beyond the last sufficient cause, and especially that, where an intelligent and responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him."

Many cases are cited in support of this doctrine. It seems to us that this is particularly applicable to this case, for it must appear evident that the immediate and proximate cause of the accident complained of was the snow and ice upon the walk. That there was no duty upon the Railroad Company to keep the walk or planks free from snow and ice, is undisputed throughout the case. This duty, if it rested anywhere, rested upon the City of Pullman.

In excepting to the following instruction, we felt that the same was clearly erroneous, paraticularly that part which we have italicized:

"If you find from the preponderance of the testimony in this case that the sidewalk where this injury occurred was constructed by the Oregon-Washington Railroad & Navigation Company, for the use of foot passengers in the city of Pullman while the work was under construction; or, *if you find that the city knew that the sidewalk would be used by the general public, then the duty rested upon the Railway Company to make the sidewalk reasonably safe for that purpose.* Whether it was reasonably safe, is for you to determine; and, in determining that fact, you must take into consideration the temporary character of the walk, the purpose for which it was constructed, and all the surrounding circumstances.

If you find that the railway company constructed it for the use of the public, or with knowledge of the fact that they would use it, and if you find that it was not reasonably safe for that purpose, the plaintiff is entitled to recover here unless she herself was guilty of contributory negligence."

We do not see how knowledge on the part of the city in regard to the use to be made of the sidewalk during the period of reconstruction could be binding upon the Railroad Company. You will notice the court says: "If you find that the *city knew the sidewalk would be used by the general public,* then the duty rested upon the railroad company to make the sidewalk reasonably safe for that purpose."

This assignment of error is found in sub-division nine of Assignment of Error V.

We have discussed at another place in the brief the error complained of under sub-division ten of Assignment of Error V, which has reference to the

instruction of the court given upon the impairment of the earning capacity of defendant in error.

We respectfully submit that the verdict of the jury should have been set aside, and judgment entered in favor of the plaintiff in error. If the plaintiff in error were not entitled to judgment, we contend that it clearly was entitled to an order granting its motion for new trial.

Respectfully submitted,

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